



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 628 OF 2012

BETWEEN

PETER GACHENGA KIMUHU.....CLAIMANT

VERSUS

KENOLKOBIL LIMITED.....RESPONDENT

Rika J

CC. Edward Kidemi

Ms. Wambui, Mr. Njenga, instructed by Winnie Wambui & Company Advocates for the Claimant

Ms. Effendy instructed by Karimbux- Effendy & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 17th April 2012, while the Respondent filed its Statement of Response on 29th May 2012. Parties subsequently filed Supplementary Pleadings and Bundles of supportive Documents. The Claimant gave his testimony on 31st January 2013, 22nd February 2013, and 16th May 2013 when he rested his case. The Respondent's Human and Administration Manager Ms. Roseline Ndambuki gave evidence on 24th September 2013 and 12th February 2014, while the Group Finance Director Ms. Patricia Lai gave her testimony on 10th March 2014, bringing the hearing to a close. The dispute was last mentioned in Court on 21st July 2014, when the Parties confirmed the filing of their Final Arguments, and Award reserved for 10th October 2014. The date for delivery of the Award has been brought forward because the undersigned Trial Judge has been transferred to Mombasa.

The Claim

2. The Claimant states he was employed by the Respondent Oil Company on 27th June 1995, as an

Accounts Assistant. At the time the Respondent was known as Kobil Petroleum Limited, incorporated in the U.S.A. He started off on a monthly salary of Kshs. 16,200. He worked diligently and by the time he left employment, earned a monthly salary of Kshs. 229,132. His performance was always evaluated as 'good' or 'very good.' His good work was recognized by the Respondent through the salary increments, bonuses and entertainment allowances.

3. He reported for duty as was his routine, on 13th December 2011. As he was preparing to close for the day, he was informed by the Human Resource Manager Roseline Ndambuki, through word of mouth, that he should not report to work the following morning. His contract, he was told, had been terminated on account of poor performance. This according to the Claimant was not true at all, the Respondent having through the years, recognized and rewarded the Claimant for exemplary service.

4. He reported for duty on 14th December 2011, only to find a Notice circulated to other Members of the Staff, and pinned on the Notice Board, announcing that the Claimant had been summarily dismissed the previous day for poor performance and failure to meet deadlines. The Notice was copied to all Regional Offices of the Respondent, an act which the Claimant felt, was calculated to injure his character and standing in the society, as well as before his peers.

5. Termination offended Section 45 of the Employment Act 2007. The Claimant states he was not paid his accrued benefits. These included units earned in the Kenolkobil Limited Group Employee Ownership Plan [ESOP]; unpaid leave allowances; provident fund; overtime worked; contributions to the provident fund; and terminal benefits. He seeks the following Orders:-

- a. 12 months' salary in compensation for unfair termination at Kshs. 2,749,584.
- b. December salary at Kshs. 99,294.
- c. Payment in lieu of notice at Kshs. 229,132.
- d. Interest on the total amount in [a] [b] and [c] at Court rates till payment is made in full.
- e. General Damages for unlawful termination and victimization of the Claimant.
- f. Employee'/Employer's contribution to Pension Scheme.
- g. Service Gratuity between July 1995 and December 2011.
- h. Units, shares, dividend and share certificates earned in ESOP Scheme.
- i. A true statement of account of benefits earned in [f] [g] and [h] above.
- j. Any other relief the Honourable Court may deem fit and just to grant.

6. The Claimant testified he worked hard and rose through the ranks, last holding the position of Financial Accountant in the Finance Department. He was occasionally rated very good on appraisal, and salary raised based on his good performance. He was advised by Roseline Ndambuki that his services were no longer required. She told him this was a decision made by the Management.

7. He was not issued a letter of termination. He was not given the reasons for the decision. He just found the information in the Notice pasted on the Notice Board. The Notice alleged the Claimant's services were poor. He consulted his Manager, Mr. Waithaka, who did not have any information on when the Management took a decision against the Claimant. He was told this decision was final.

8. Some months before termination, his performance had been evaluated by the Respondent and rated as 'very good.' Waithaka had never complained about the Claimant's performance. The Respondent alleged in its Statement of Response, that the Claimant breached terms of his employment; he denied breaching any terms of his employment.

9. Kimuhu explained to the Court that the Respondent undertook a process of computerization of its Fixed Assets. An external Firm, Extra Solutions Limited, was engaged to carry out the task. The Firm was to tag the entire Respondent's Fixed Assets. There was a delay in carrying out the process, which the Respondent blamed on the Claimant. The Claimant explained he was not the cause of the delay. The Respondent was unable to get the tags on time. The Contractor reported to Waithaka, while Kimuhu coordinated.

10. There was communication from Extra Solutions Limited to Waithaka on 10th May 2011, explaining that delay was occasioned by the failure of the Suppliers in delivering the tags to Extra Solutions Limited. The contract was concluded on 8th March 2011. The contractor had decided to cancel the order and source the tags from elsewhere. Extra Solutions Limited Managing Director Ndegwa Murimi wrote to the Respondent stating that his Firm was “*grateful for all the support from Mr. Kimuhu who coordinated the exercise very effectively....*”

11. The Respondent had not issued any warning to the Claimant with respect to the tagging project. There was another allegation raised by the Respondent against the Claimant, relating to complaints made by the Respondent’s Bank. The Bank, KCB had introduced a system which was prone to errors and omissions. The Claimant explained he had cleared the issues forming the subject of the complaint, and the Respondent should have been grateful to him for doing so. In July 2011, the Claimant had received a letter from the Respondent, saying his performance was very good. He was given the long service award for dedication and motivation.

12. There was no meeting between the Claimant and his Supervisor Waithaka, before termination. The dismissal letter dated 13th December 2011 attached to the Statement of Response as ‘KK3’ did not allude to such a meeting. The dismissal letter alleged the Claimant failed to discharge his duty with skill, care and diligence. He had not been issued any letter warning him about this failure. He did not receive the letter of dismissal. He saw it first in the Statement of Response.

13. Roseline Ndambuki just gave him a Form to fill in clearing out. The Notice pinned on the Board stated the Claimant’s performance was poor, which was not the same thing stated in the letter of dismissal. He did not handle money or marketing. He worked with Depot Managers, handling assets. He did not interact with Clients. The Final Payment Authorization attached to the Response as ‘KK5,’ was prepared by the Respondent on 25th May 2012, while the Response was filed on 29th May 2012. The Claimant was not able to say if the document was prepared with the case in mind.

14. ESOP was an Employee Share Ownership Scheme. Incentive Units were allocated to Employees and given a vesting period of 3 years. They matured after 3 years. The Claimant had 6,692 to vest on 26th May 2014. He had 555 Units allocated in 2006 which were to mature on 24th April 2010. There was a shares’ split, which multiplied the Claimant’s shares to 5550. He could not recall when the split took place, but it was after 2006. The ESOP was governed by the Human Resource Manual. The Units could only be lost under the conditions stated in the Manual. He wishes to be paid the value of his shares, but was unable to specify the value.

15. He did not agree with the Members Benefit Statement as at 31st December 2009, which showed his benefits at a total of Kshs. 3,246,817. He did have the contact of the Trustees, but the Respondent had such contact. Kimuhu testified that he did not receive the terminal benefits shown in the Final Payment Authorization ‘KK5.’ He was advised this would be deposited to his Account; it never was.

16. Cross-examined, the Claimant testified he held various positions with the Respondent, having joined as an Assistant Accountant, and left as the Financial Accountant. He moved from one department to another. It was on promotion, not lateral transfer. He moved from Internal Audit Manager to Treasury Manager as a promotion. From Treasury Manager to Financial Accountant, was probably a lateral transfer.

17. There were tokens and merit awards. Merit awards were given to Employees who had been appraised. It was done across the board. COLA [Cost Of Living Adjustment] was given to all Employees, every year, to cushion them against inflation. He was notified by Ndambuki on 13th December 2011 that he did not need to report for duty on 14th December 2011. The Claimant’s Manager was absent. The Claimant did not receive any warnings, verbal or written. He did not receive any reprimands. He was coordinating the tagging of fixed assets project.

18. This involved the tallying of assets countrywide. The Claimant was the bridge between the

Respondent and the external Consultant. This was within the Claimant's duties. There as a timeframe for the exercise. There was a delay. This was because the Consultant was unable to get the tags from the Supplier on time. The assets were many. The Claimant did not fail in putting the information together.

19. He was in charge of the bank reconciliations. There were long outstanding items. KCB introduced a new system. There was a huge problem, which resulted in many un-reconciled items. There were system errors. The Claimant ensured reconciliation was done. At the time, the Claimant was the Financial Accountant, supervised by Waithaka. The Supervisor was happy with the Claimant's performance and never reprimanded.

20. After termination, the Claimant was asked to sign the Clearance Form. He signed the checklist, was told about termination, but was not given a letter of termination. He did go on 14th December 2011, to merely pay to the Respondent money for the car which he was using courtesy of the Respondent, and which he wished to own; he went to work on 14th December 2011 to perform routine duties. He went with the cheque ready to take the car.

21. Shares which had not vested could not be claimed. After vesting, one could sell his shares. The Claimant did not get a certificate for the vested shares. They are held by a Trustee. He was not aware that he would need the permission of the Trustee to sell his shares. He was entitled to dividends, and was not aware of any exceptions on this, under the Human Resources Manual.

22. Redirected, the Claimant told the Court not everyone rated excellent in the Respondent's appraisal system. The Claimant was consistently above 'good.' COLA was given across the board, every year. The Claimant was appraised in July 2011, and his contract terminated in December 2011. The Claimant could not have been reprimanded in February 2011, and rated very good at the same time. The external Consultant did not attribute delay to the Claimant; he instead appreciated the role played by the Claimant in the tagging project. The problem with KCB was its own internal system. KCB was overwhelmed, and the issue could not be resolved from Kenolkobil. No warning was given to the Claimant about the KCB issue. He went prepared to pay for the car on 14th December 2011, but was not aware his contract was at an end. Employees had the option to sell or keep their shares. Over 10,000 shares had vested. The trustee was the Finance Director of the Respondent, an Employee of the Respondent.

The Response

23. The Respondent agrees to have employed the Claimant as the Financial Accountant. It is true he was summarily dismissed by the Respondent on 13th December 2011, and earned Kshs. 229,132 per month. His contract bound the Claimant to observe the following values:-

- Act towards the Respondent in all good faith, fidelity, and loyalty, and not to the detriment or completion with the Respondent's interests;
- Obey reasonable and lawful directions of the Respondent;
- Not to act to damage or destroy the trust and confidence between the Claimant and the Respondent;
- Act with all due skill, care and competence; and
- Not neglect his duties to the Respondent

The Claimant breached these values by failing to execute his duties within the expected standards, thereby exposing the Respondent to risk, loss and loss of credibility.

24. The Claimant was the Coordinator in the Respondent's Fixed Assets Tagging Project. He linked up with the external Contractor. The Manager who supervised the Claimant discovered that the Claimant failed to provide information or feedback, leading to delay of the Project. The Claimant was reprimanded by the Manager in the months of April and May 2011.

25. Around July 2011, the Manager warned the Claimant verbally about his failure to resolve disputed

entries raised by the Respondent's Bank. The Claimant was warned by the Manager about the standard of his work. He did not improve. His salary increments were given in accordance with the Human Resources Policy Manual. COLA was given across the board, to assist Employees cope with inflation and high cost of living. Christmas Gift Vouchers issued to all Employees. Long Service Award was given to the Claimant in recognition of his long years of service, not in reward for good performance.

26. The ESOP shares were valid only during employment. Once dismissed, the Employee ceased to have the right to own the shares. The Claimant's final dues amounted to Kshs. 132,276 after deductions. The Certificate of Service was readied by the Respondent for the Claimant's collection. Termination was fair. The Claimant is not entitled to the prayers sought.

27. Roseline Ndambuki has over 10 years' experience at the Respondent. She knew the Claimant, and found him already working for the Respondent, at the time she joined. At the time of dismissal, the Claimant was the Supervisor, Fixed Assets. His Job Description was agreed between him and the Respondent.

28. He was severally promoted. In some cases, he was transferred laterally. His contract was terminated in December 2011. Appraisal was carried out every 5 years. It did not run with every Financial Year. The Respondent looked at the objectives set by the Employee and the character of the Employee, in appraising his performance. He received COLA, which was paid to all Employees across the board, irrespective of their performance. . Merit was based on ratings.

29. His Supervisor complained the Claimant did not work to the required standard. He was dismissed on 13th December 2011. This was in relation to KCB reconciliation. Fixed Assets fell within his docket. The Respondent was computerizing. The Claimant delayed information due to the external Contractor. There were verbal warnings issued to the Claimant by the Respondent. This was recognized under the Human Resources Manual.

30. This was a major project. The Company had its role to play in the project as did the Claimant. There were deadlines set internally. KCB changed its system. There were a lot of outstanding items. It was the Claimant's role to reconcile and close. This was outstanding for a long time. Roseline did not know what challenges the Claimant had in the KCB reconciliation.

31. Kimuhu was granted a fair hearing. Roseline, Kimuhu and Waithaka attended the hearing. The meeting took place during the morning hours. Both the Claimant, and Supervisor Waithaka, raised their issues. The Claimant was informed of the decision and the reason for the decision. He went to his desk, and later cleared, while making it clear he was not happy with the termination. He already knew of the decision when he reported at work on 14th December 2011 He had a Company car, which had an outstanding purchase price of about Kshs. 80,000. He was supposed to forfeit the car on termination. He therefore went to work on 14th December 2011, ready with a cheque in favour of the Respondent, which would also enable him, retain the car. He went ready to collect the logbook, and was fully aware his contract was over.

32. Rosaline personally called the Claimant to pick his terminal dues, including his pension, which he refused to collect. His dues were computed at Kshs. 198,414. He was not owed notice pay, as he was summarily dismissed. He did not collect his Certificate of Service, though readied for his take. His pension was about Kshs. 4 million, which he did not collect. Compensation and gratuity are not payable. ESOP shares were not saleable if the Employee resigned. They matured after 3 years. If the Employee is dismissed or does not exercise his options while in service, he is not entitled to demand for the value of the shares under the Rules regulating ESOP.

33. On cross-examination, Roseline told the Court she holds an MBA degree from the USIU Nairobi. She was employed as an Intern by Kenolkobil. She was employed as the Marketing Officer in January 2003, and became the Human Resource Manager in September 2010. This was after she obtained her MBA. Human Resource Management was part of her core undergraduate studies.

34. She called the Claimant in morning of 13th December 2011 for a disciplinary meeting which involved the Claimant, Finance Manager Waithaka and Roseline. He went to clear from his desk later in the afternoon. Paragraph 11 of the Response did not show what time the meeting took place, or that Roseline was in attendance.

35. The meeting was held in the Human Resource Manager's Office. The Finance Manager was senior to Roseline, but went to Roseline's office because at hand was a human resource issue.

36. By the time of his dismissal, the Claimant was the Supervisor in charge of Fixed Assets. Roseline did not know when the problem with KCB started. It took years to sort out. It was the responsibility of the Claimant to attend to the issue. The role fell under the Claimant as per his job description of December 2009.

37. The Fixed Assets were to be computerized. This was to be done through tagging and verification. Extra Solutions Limited was engaged to carry out the exercise. This Consultant had its role to play in the exercise, and could be apportioned blame in the delay. From the Respondent's internal position, Kimuhu had his role to play

38. The letter dated 10th May 2011 from Extra Solutions Managing Director Ndegwa Murimi to the Respondent's Finance Director, referred to various telephone and e-mail correspondence between the Parties, relating to delay in the Fixed Asset project. Roseline could not say who had exchanged telephone and e-mail communications. The Parties to these communications referred to delay caused by themselves. The report by Extra Solutions of 19th September 2011 was not available by the time the Claimant was summoned to the disciplinary meeting on 13th December 2011.

39. The Human Resource Manual made provision for warning, where the Employee engages in an act relating to performance or misconduct- which merits warning. The Claimant had received several verbal warnings. His Supervisor Waithaka left employment in 2012. Waithaka reported to his Superiors that Kimuhu was the cause of the delay. There was a meeting held amongst the Senior Management where a decision to terminate the Claimant's contract was made. This was before the disciplinary hearing of 13th December 2011. The purpose of the disciplinary meeting involving the Claimant, Roseline and Kimuhu was to explain to the Claimant, what decision had been made by the Senior Management. The Claimant did not participate in the meeting where the actual decision to terminate his contract was made. Roseline was not present at that meeting. She has never given the Claimant a verbal warning. She gave a letter to the Claimant dated 19th July 2011, signed by herself and Waithaka, rating the Claimant's performance as 'very good.' Fixed Asset verification was going on at the time. Extra Solutions concluded Kimuhu played his role effectively. That was the view of the Consultant, not the Respondent's. The Claimant was not issued with a letter to show cause why disciplinary action should not issue. He was not heard.

40. Roseline testified she no longer works for the Respondent, having left employment in October 2013. She took her role as Human Resource Manager seriously. Dismissal of an Employee was taken seriously. She did not attend the meeting which resulted in termination. She did not have the minutes of the meeting in Court. She was asked to communicate the decision to the Claimant. The Claimant knew the issues for which his contract was terminated. The Consultant did not know the internal angle to the delay in the tagging exercise. It was not true that the Claimant was dismissed through the Internal Memo. Roseline was not sure whether the dismissal letter issued to the Claimant on 13th December 2011 or 14th December 2011.

41. Appraisal system did not capture the entire range of an Employee's performance. There were other values. Assets were in the value of billions of Kshs. The Claimant was expected to improve on being warned. He was under watch. The Claimant had met the Management several times before dismissal. Redirected, Roseline testified that the Claimant was dismissed on 13th December 2011. His lateral transfer was made because he was unable to handle the particular docket. He worked for 15 years, and was aware of his duties, as given under his job description. He was not able to handle pressure and workload, and was moved laterally.

42. Patricia Lai testified she is the Group Finance Director. She oversees the Group's Finances everywhere, including in the Respondent's Subsidiaries outside Kenya. The Finance Manager reported to her. She met the Claimant when she joined the Respondent in January 2000.

43. The Claimant was a Section Head, reporting the Finance Manager Waithaka. Waithaka in turn reported to Lai on financial functions. The Claimant's duties were given in a job description document, which he accepted and signed.

44. The Respondent was to take all its fixed assets, and load them to the Oracle System. A Consultant was engaged. This exercise fell under the Claimant's docket. There a huge delay in carrying out the exercise.

45. There were two reasons for the delay. One, the Respondent did not conclude things it was supposed to conclude, to facilitate the Consultant. Two, the Consultant delayed in development of tags. The Respondent wished to change from evaluation of assets to historical evaluation. This aspect was also delayed because the Respondent failed in supplying of information.

46. Delay from the Respondent was escalated. Financial Statements had to be prepared based on historical evaluation. The Claimant was to provide the key information. Extra Solutions wrote on 19th September 2011 to the Respondent, saying the Claimant discharged his role well. Kimuhu was the Consultant's contact person.

47. The Claimant discussed his shortcomings with the Finance Manager and the Human Resource Manager. Verbal warnings could be issued under the Respondent's Human Resource Manual. Bank reconciliation fell within the Claimant's docket. It was still under him when he was the Accountant, and remained under him when he moved from Treasury to General Ledger. The Respondent expected the Claimant to go to KCB and sort out the mess. Reconciliation was only done after the Claimant left.

48. Lai explained that Fixed Asset was a special project, an ongoing responsibility under Kimuhu. Reconciliation was to be done adequately. The Respondent retains Joint Depots, and reconciliation had to be carried out satisfactorily. Lai did not recall the Claimant being promoted during her time. He was laterally moved because Treasury was giving him too much pressure.

49. Employees were given increments based on scale. The Claimant received 2% increment, which was an average increment. Everyone received the COLA. The Claimant is not entitled to damages. He is not entitled to notice pay. He was paid for days worked and prorata leave. He was not victimized. The Respondent followed its standard procedure. He is not entitled to gratuity. The ESOP Trust Deed states that upon dismissal, an Employee's Units become invalid even if they had vested. If the Units had been liquidated during employment, the Respondent could not do anything. Lai was present when the Management discussed the Claimant's non-performance, but was not there when the actual dismissal meeting took place.

50. She testified on cross-examination that the Claimant was assigned the responsibility for Fixed Asset and KCB Reconciliation. KCB informed Waithaka there was a problem at their Head Office.

51. The Fixed Asset project was a major exercise. Extra Solutions Limited was engaged at the end of 2010. The aim was to have technology tagging. The Consultant was contracted on 8th March 2011. The Consultant reported there were challenges. The Consultant had called Lai complaining about Kimuhu. Lai however did not have any recording of such complaints.

52. The Claimant's terminal dues were computed on 25th May 2012, and approved on 28th May 2012. This has not been paid, due to ongoing litigation. His salary was normally paid through the Bank. The Claimant's Advocates wrote demand letter before the Claim was filed. Lai conceded she did not know why the Claimant was not paid for days worked. There were no personal differences between her and the Claimant.

53. Dollar purchasing was not exclusively done by the Claimant. Other Officers could do this, if the

Claimant was not able to do so. Lai could purchase directly. There was a Management meeting which resolved to dismiss the Claimant. Lai did not have the exact date when the meeting took place, or have any minutes recording the meeting. The Claimant did not attend the meeting. The summary dismissal was indicated to be 'confidential.' There was a Memo however, widely circulated, announcing the summary dismissal to all staff.

54. The Claimant had merit award about 5 months before dismissal. He had his peak moments. Consultants are given to praising people they work with. Waithaka used to complain about the Claimant's performance. Paragraph 6 of the Response alleged the Consultant complained about the Claimant's work. This was contrary to what was said in the Consultant's letter. There were verbal warnings. Lai did not see any written warning issued to the Claimant. She reiterated on redirection that the terminal dues were not released to the Claimant owing to the pending litigation. The Finance Manager tried to deal with the performance issues at the first instance. The matter only came to the attention of Lai on escalation. It is in the Respondent's culture to have verbal communication. The Respondent emphasizes on correcting and developing its Employees, rather than punish them. The Respondent prays for dismissal of the Claim.

The Factum

55. The Claimant submits the Respondent did not show fair and valid reason for termination, or carry out its decision fairly, as required under Section 41, 43 and 45 of the Employment Act 2007. The Respondent attempted to lay blame on the Claimant for delay in the tagging of the Fixed Assets. The Consultant contracted to undertake the exercise, discounted the Respondent's position, and lauded the Claimant for his good work. Secondly, the Respondent alleged the Claimant mishandled the KCB reconciliation task. The Claimant demonstrated there were errors in the General Ledger, complicated by the new system introduced by KCB. He worked very hard, cleared un-reconciled items, and his Supervisor was happy with him. He earned various salary increments and commendations, based on his good work. One such commendation was made in July 2011, just a few months before he was dismissed.

56. There was no hearing granted to the Claimant in terms of Section 41 of the Employment Act 2007. He was not given notice of any hearing, as determined an Employee should be given, in among other decisions, the ***Industrial Court of Kenya Case of Shankar v. DHL Global Forwarding [K] Limited [2012] e-KLR***. The Claimant was not invited before the Management Team which decided to terminate his contract. It was left to Roseline to merely communicate a decision in which the Claimant was not involved.

57. The Claimant concludes that he has established a case for grant of what he termed as 'special damages' of Kshs. 3,078,010. He is entitled to the ESOP shares, which were it not for the unfair and the unlawful decision of the Respondent, would have matured and been at his disposal. He submits he merits the remedies sought.

58. The Respondent argues the Claimant's contract was terminated on valid and fair grounds, and carried out fairly. He failed to execute duties within the expected standard and was verbally warned and reprimanded in April, May and July 2011. He was summarily dismissed on 13th December 2011, after the Management deliberated on his case. He engaged in gross misconduct by willful neglect or careless performance of his duty. He failed to clean up the Ledger, delaying the KCB reconciliation. This task was only completed after Kimuhu left employment.

59. He was responsible for ensuring completion of the Fixed Asset exercise. It was not the external Consultant's responsibility. The Claimant failed in discharging this responsibility, which elicited complaints from his Supervisor Waithaka. He let down the Finance Department. The Respondent's Code of Conduct stated Employees should carry out their business with skill, care and diligence. The Claimant failed to do so and was summarily dismissed.

60. The Respondent agrees the Claimant is entitled to Pension, as given in the Pension Scheme Benefit Schedule dated 27th December 2012; he is not entitled to gratuity as gratuity is not a right as held in the ***Kenya High Court case of Joseph Sitati v. Kenya Ports Authority [2010] e-KLR***; he did not exercise his

option with regard to the ESOP shares before dismissal, and they divested on dismissal; and his claim for 12 months' salary is untenable as general damages were not awardable prior to the enactment of the Employment Act 2007 or under the common law, and the Claimant was in any case summarily dismissed on valid grounds. The Respondent urges the Court to decline the prayers sought, save as conceded by the Respondent.

The Court Finds and Awards:-

61. The facts establishing the employment relationship between the Parties are not disputed. The Claimant was first employed by the Respondent's predecessor, Kobil Petroleum Limited, as an Accounts Assistant, on 27th June 1995. His starting salary was Kshs. 16,200 per month.

62. He was variously promoted or laterally transferred, culminating in his rise to the position of Financial Accountant, as at 13th December 2011 when he was summarily dismissed by the Respondent. His last salary was Kshs. 229,132 per month.

63. His employment was regulated by a written contract dated 27th June 1995. The terms and conditions were varied over time, through letters advising the Claimant of his promotion, lateral transfers and pay increment.

64. His employment was similarly subject to the Human Resource Policies and Procedures Manual. The Manual contained among others, a Code of Conduct and Employee Incentive Plan and Rules, known as Employee Share Option Plan [ESOP]

65. There is adequate material in the form of letters given to the Claimant by the Respondent, over the years, indicating he was either promoted or moved on lateral transfer. His classification changes were not restricted to either promotion or lateral transfer.

66. The Human Resource Manual describes promotion as an assignment to a higher grade on regular basis, involving a change in the employee's regular classification. Lateral change was described to involve the change in the Employee's job classification with the pay remaining the same.

67. The Claimant was promoted to the position of Internal Audit Manager on 1st November 2002, which involved job reclassification and salary increment. Other promotions took place on 8th August 2001, and 26th April 2002. Promotions were mainly preceded by a period in which the Claimant served in an acting capacity. He was laterally transferred from Accounting and Finance Department to Assistant Marketing Analyst in a letter dated 1st March 1998. It is important to make this observation from the outset, so as to be clear on what every form of classification changes represented.

68. There were two documents on record, communicating the summary decision to the Claimant, both signed by the Human Resource Manager Roseline Ndambuki. The first which is not contested is the Internal Memo dated 14th December 2011, which was copied to all Members of the Staff at the Respondent's Head and Branch Offices Countrywide, and to the Group and Management Team. The second is the letter of summary dismissal dated 13th December 2011, whose receipt is disputed by the Claimant.

69. The Internal Memo informed its addressees that the Claimant was summarily dismissed with effect from 13th December 2011 due to poor performance. The Management, the Memo stated, "*noted his inability to perform his duties efficiently, and within agreed deadlines....*" The unacknowledged letter of summary dismissal broadened the reasons for summary dismissal to include "*inability to execute your duties within the expected standard and laid out procedures thereby exposing the Organisation to risk or loss of money and credibility.... The Company Code of Conduct clearly states that all Employees should carry out business with skill, care and diligence which you have failed to demonstrate.*"

70. Under Section 43 and 45 of the Employment Act 2007, the Employer must show valid and fair reason or reasons for termination. Under Section 41 and 45, termination procedure must be fair. The questions that fall to be answered are whether the Respondent demonstrated valid and fair termination reasons; whether the termination was in conformity with the minimum statutory procedural guarantees; and whether the Claimant merits the remedies sought.

71. There were two incidents, given by the Respondent, to comprise fair and valid grounds for summary dismissal. The first related to the Claimant's role in the Verification of the Respondent's Fixed Assets. This involved the physical verification of the assets, with the objective of confirming their existence, condition and location. Data from the verification exercise in electronic format would be uploaded into the Oracle Financial Management System.

72. The Claimant carried the responsibility for coordinating this exercise. An external Consultant, Extra Solutions Limited, was contracted by the Respondent in an Agreement for Fixed Assets Tagging and Verification Service dated 8th March 2011. There was delay in carrying out the exercise, which the Respondent blamed on the Claimant, and which was the main reason why the Respondent charged in the summary dismissal communication, that the Claimant failed to do his work efficiently and within agreed deadlines.

73. The evidence from Rosaline and Lai was that the Consultant had his role and could be apportioned blame for the delay. The Claimant had his role, and internally was responsible for the delay, in the view of the Respondent. According to Lai, the Respondent assessed the Claimant's role independent from the Consultant, and was satisfied the Claimant did not discharge his role as required under his contract.

74. With all due respect to the Respondent's Witnesses, this cannot have been the right approach in determining why there was delay. The conclusion that the Claimant caused the delay was neither correct nor fair, in light of the communication passing between the Finance Manager Waithaka, and the Consultant's Managing Director Ndegwa Murimi.

75. The first thing that must be noted is that although the communication on summary dismissal stated the Claimant had failed to carry out his duties within certain timeframes, it was not made clear to the Court what were the timeframes in conducting and concluding the Fixed Asset Verification exercise. The Respondent's Group Finance Director Lai testified the Claimant was slow in making available certain information. The Consultancy Agreement was signed on 8th March 2010. The Preliminary Report was ready for the attention of the Respondent by August 2011, and the Final Report delivered by September 2011. The Respondent did not come out clearly with its projected timeframes, and explain what the Claimant exactly did or failed to do, to frustrate the Respondent's projection.

76. The letter of Ndegwa Murimi from Extra Solutions dated 10th May 2011, does not place any blame on the Claimant for the delay. The Consultant explained that it had ordered for barcode tags from its regular Suppliers immediately after signing the Consultancy Agreement. The Supplier was able to deliver polyester type within two weeks, while there was a problem in the supply of raw material for the manufacture of aluminum tags causing the delay. The Consultant renegotiated the expiry date for the Consultancy Agreement, to ensure the work was completed in time. There is no mention of anything the Claimant did, or failed to do, to cause the delay.

77. In the Final Report, Extra Solutions Managing Director picked out the Claimant for praise, stating that, "*we are grateful for all the support from Mr. Kimuhu who coordinated the exercise very effectively...*" The Respondent's position was that Kimuhu failed from their viewpoint and was the cause of the delay; that Waithaka the Finance Manager complained about him; that he delayed access to information; and that it was frequently the case for Consultants to heap praise on Employees who they are assigned to work with in any enterprise.

78. This position was not anchored on any evidence or other material availed to the Court by the Respondent. There was nothing to contradict the information about the Claimant, contained in the letter and report of Extra Solutions Limited. What information did the Claimant delay; why would a Consultant,

who alleges to have had a long and mutually fruitful relationship with the Respondent, mislead the Respondent with a faint praise for the Claimant; and what exactly did the Claimant do or fail to do, to delay the exercise? Would the Claimant have done anything to hasten the acquisition of raw material by the Consultant in order to have the aluminum tags manufactured and delivered expeditiously? In the view of the Court, the Consultant stated the correct position in explaining the role of the Claimant. The allegations that Waithaka, who was the recipient of the communication from Ndegwa Murimi, complained about the Claimant in respect of this project, is not supported by any statement in the communication between Murimi and Waithaka, or by any evidence given in Court by Waithaka.

79. The second substantive ground in justifying termination related to KCB reconciliation. The evidence on this was blurred. Neither the Claimant, nor the Respondent whose duty it was to make the Court understand KCB reconciliation as a ground justifying termination, gave clear evidence on this aspect.

80. Paragraph 7 of the Statement of Response states that, *“in or around July 2011, the Manager warned the Claimant verbally about his failure to resolve disputed entries raised by the Respondent’s Banks, resulting in complaints by the Respondent’s Banks.”* In the evidence of the Respondent’s witnesses, the complaint related to one Bank, KCB.

81. There was no material from the KCB capturing the nature of the complaint. Going by the bits and pieces of evidence from the Parties, there was an accumulation of entries in the Respondent’s account with KCB, which had not been properly reconciled, and which was compounded by a complex new banking system put in place by the Bank. The Claimant testified he found this state of affairs in the Respondent’s Ledger when he was assigned the docket, and did all he could to reconcile the records. The Respondent appeared to blame the Claimant, not because he created the situation, but because he was slow in cleaning it up. The Court again was not persuaded that the Respondent gave adequate material or evidence, in establishing this as a valid and fair ground to warrant summary dismissal.

82. The lack of clarity in the Respondent’s accusations against the Claimant may have been avoided, if the Respondent adopted a culture of communication through the written word, instead of its preferred oral tradition. The Claimant was reportedly given many verbal warnings, which was allowed under the Respondent’s Human Resource Manual. Even where verbal warnings are permitted, evidence of such verbal warnings must be preserved in an employment record. The Respondent should have had a record, indicating when verbal warnings are issued, otherwise it becomes difficult to establish the veracity of such warnings, or recall when, where and for what such warnings issued, for purposes of determining future courses of action.

83. It similarly would have been different if the Respondent had reduced its accusations against the Claimant in writing, and called upon him to respond in writing. The Respondent is a reputable Oil Company, and a leader in the industry. At heart of the alleged failures by the Claimant, were assets running in to billions of Kshs. which would suggest to the Court a less cavalier attitude on the part of the Respondent, in investigating and disciplining the Claimant. The common evidence of Roseline and Lai was that the Claimant was verbally warned, he knew of the allegations against him, and the Human Resource Manual endorsed these verbal interactions.

84. It was difficult without the benefit of written records, for the Respondent to show that termination was preceded by valid reasons, and carried out fairly. The written records provided by the Claimant, tended to discount all the verbal explanations from the Respondent.

85. The Claimant demonstrated that he was on most occasions promoted for his good work. Salary level was determined by six factors, among them, individual performance. Merit salary increment was subject to positive performance evaluation. No increment could be granted to an Employee whose performance was rated unsatisfactory. These rules are in the Respondent’s Human Resource Manual.

86. While the Claimant went overboard with his evidence that a long service award, COLA award and Christmas bonuses were invariably evidence of good performance, he cannot be faulted for thinking that salary increments were a measure of his good performance. On 19th July 2011, he was granted ‘Merit

2011' and given a 2% salary increment. As in the past merit awards and increments, the Respondent through none other than Roseline Ndambuki and Patrick Waithaka, advised the Claimant that, " we congratulate you on the above merit increase...it is hoped you will continue with your cooperation and good performance....."

87. Challenged to explain this assessment of the Claimant coming five months before dismissal, Roseline and Lai lamely testified that the Claimant was judged not only on the performance, but also on character. The reasons for termination were performance related, nothing to do with character, and this shifting of evidence on the part of the Respondent did little in persuading the Court that there were valid grounds for termination.

88. The Court has already suggested that by the espousal of an oral tradition, the Respondent failed in affording the Claimant fair procedure. There were no written charges to which the Claimant could intelligibly respond. There was not a single written warning. There was no hearing before the decision was made.

89. Roseline informed the Court the Top Management met and deliberated on the Claimant before 13th December 2011. She did not recall the date, or provide any details of the meeting, or have the minutes of the meeting. She was forthright that the Claimant did not attend the meeting where the decision was made. She in turn called the Claimant and his Manager Waithaka who was her senior to her Office on 13th December 2011, where the decision to terminate the Claimant's contract was communicated verbally.

90. There was no letter of summary dismissal issued on the Claimant on 13th December 2011. Instead, the Respondent through its Human Resource Manager wrote an Internal Memo, circulated to all the Members of the Respondent's Staff countrywide, informing them that the Claimant had been summarily dismissed the previous day. The Internal Memo also served to warn other Employees that, "we expect all Employees to champion the interests of the Company at all times, comply with their terms of employment and perform their duties with skill, care and diligence." While this letter was not copied to anyone outside the Organization, its wide circulation within the Organization, its tone and tenor, and the fact that the summary dismissal letter crafted by the Respondent was indicated as 'confidential,' all made the Internal Memo appear to have been intended to injure the Claimant's character and employability.

91. The Court agrees with the Respondent that at the time the Claimant reported on 14th December 2011, he knew he was already dismissed, and went ready to clear and pay for his car. There was no surprise element for him on 14th December 2011, in so far as knowing about his dismissal was concerned. It was shocking however, that rather than give him the dismissal letter in confidence, the Respondent opted to broadcast his dismissal and alleged failings countrywide. Employees and Employers must always treat each other with civility, even at the end of the relationship, as required under the Industrial Relations Charter.

92. The disciplinary procedure under the Human Resource Manual was completely ignored. In a capsule, this procedure required all actions that may lead to involuntary termination, are preceded by an inquiry into all relevant circumstances. It requires that the Employee is fully acquainted with the charges against him and fully heard in his defence. Particulars of the charge and defence are to be recorded. These steps were completely absent from the process of termination. The Human Resource Manual captures the essence of the procedural protections contained in Section 41 of the Employment Act 2007.

93. From these observations and findings, it is the conclusion of the Court that termination was unfair. It was not based on valid and fair termination reasons, and was not carried out fairly. It offended Section 41, 43 and 45 of the Employment Act 2007, as well as the Respondent's Human Resource Manual. ***The Claimant is entitled to compensation for unfair termination, which the Court grants him, under Section 49 of the Employment Act 2007 at 12 months' gross salary, calculated at 2,749,584.***

94. There is evidence that the Claimant worked up to 13th December 2011, and was not paid for the 13

days worked in the month of December 2011. This is computed at Kshs. 229,132 divided by 26 working days x 13 days. **The Court grants him salary for 13 days, at Kshs. 114,566.**

95. As termination was unfair, both in substance and procedure, the Claimant merits the order for notice pay the equivalent of 1 month salary. **He is allowed 1 month salary in lieu of notice at Kshs. 229,132.**

96. There is no justification in seeking compensation for unfair termination as well as general damages for unlawful termination for victimization. The Court explained in **the Industrial Court of Kenya Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [UR]** and **Cause Number 1227 of 2011 between G.M.V v. Bank of Africa Kenya Limited [2013] e-KLR**, that it offends the principle of a *fair go all round*, to award general damages for breach of contract in addition to statutory compensation for unfair termination. There is in issue, one economic injury, and Employees must not replicate injuries and multiply remedies.

97. The Respondent conceded the Claimant merits the payment of his pension, as computed in the calculation sheet of 27th December 2011. **The Respondent shall direct its Staff Pension Scheme to release to the Claimant his pension dues.**

98. Service pay is not available to the Claimant. There was no provision in his contract extending to him service pay. The Respondent had in place a Staff Pension Scheme, and throughout, deducted and paid contribution on account of the Claimant, to the National Social Security Fund [N.S.S.F]. Section 35 [6] of the Employment Act 2007 discourages the payment to Employees of multiple social security payments, and disentitles Kimuhu from claiming such additional social security payments.

99. With regard to ESOP units, the Human Resource Manual explains these were the equivalent of Kenolkobil shares. They were allotted to the Employees through a Trust, as an incentive to own part of the business. The rights of the Employee, once issued with the shares, are *“as though they are owners of these shares.”* The cost of the shares was carried as a salary expense by the Respondent. When Employees sold their shares, the Trust would pay out to the Employees the full proceeds of the sale based on the redemption price.

100. The Claimant had been allocated a number of units over time. He was not able to say the exact number, and is in fact seeking a statement of account from the Respondent. The general rules in the Scheme provided the units vested in the Employee three years after grant.

101. On the date of vesting, the Employee would be issued a notification, informing them they could now exercise their options. When Employees sold their shares, the Trust would offer the shares to other Employees, or buy back the shares and the selling Employee paid the full proceeds based on the redemption price. If the Employee resigned, or was dismissed before the vesting period, or did not exercise options, he is not entitled to the shares, unless the Company made the exception.

102. The Claimant as seen above was allocated a number of units, some which had vested, while others had not, on the date of his dismissal. He seeks to know the full status of his units, while the Respondent holds that having been dismissed and having not exercised his option while in employment, the Claimant is not entitled to any shares.

103. The Claimant provided the Court with documentation showing he was allocated 555 units in 2006, which vested on 24th April 2010. He was allocated another 9000 units, which vested on 30th April 2008. In 2009 he was allocated 542 units, to vest on 27th May 2013. In 2010, he was assigned 6,692 units, vesting on 26th May 2014, after his summary dismissal. The last two allocations had not vested by the time of the summary dismissal, and in the opinion of this Court, the Claimant cannot claim ownership of the 7,234 units which were due to vest in him on dates after the summary dismissal.

104. 9,555 units however, are shown to have vested in the Claimant as at the time he left employment. He did not exercise his option, the question being whether by this failure, and because of the summary

dismissal, the Claimant forfeited the vested shares.

105. The Court finds that the vested units became an absolute, complete, and consummated benefit fully owned by the Claimant on their vesting day. They ceased to be held contingent upon any condition. What would be the logic in the incentive if the Employer is allowed to claw back on an accrued benefit? If the Claimant could exercise the sale option after the shares vested, it could only mean he acquired full ownership on the date of the vesting, and it was not for the Employer to direct him on what to do-exercise the option or not exercise the option- after acquiring full ownership. The rule allowing the Respondent to claim back ownership of a vested benefit was akin to the claiming back of bonuses already paid to an Employee for good performance. The ESOP arrangement was meant to ensure the Employees are incentivized, remained loyal and focused, and had a real opportunity to own the business which they were daily creating. The Claimant had worked for 16 years, and deserved a piece of the business, which the vested shares allowed him to own.

106. *In the Industrial Court of Kenya Cause No. 1530 of 2011 between Sunil Kumar Cchabra v. G4S Security Services Limited [2013] e-KLR*, the Court ordered the Employer to pay to the Employee a bonus payment, which the Employer had recalled on the ground that the Employee had misrepresented his performance leading to the grant of the bonus. The Court suggested that disgorgement, where an Employer recalls a benefit vested in the Employee, could only be justified, in cases where the vesting resulted from some form of violation by the Employee.

107. In the present case, the Court can see no logic or justification in the Respondent claiming what was vested and non-forfeitable. An Employer should not reclaim from an Employee an accrued benefit, unless that benefit accrued through the violation of the Law, or the Contract. The rule suggesting that the Claimant could lose what had vested in him, after resignation or dismissal, is in the view of the Court a rule which has no legal validity, offends fair labour practices and property rights.

108. The Claimant is entitled to the vested units amounting to 9,555. Other units had not vested on the date of dismissal and the Respondent would be entitled to reclaim those units.

109. The Court does not find it fair to grant orders on costs and interest. Each party shall meet its own costs. No order on the interest. In sum-:

- a. ***Termination was unfair;***
- b. ***The Respondent shall, within 30 days of the delivery of this Award, pay to the Claimant 12 months' gross salary in compensation at Kshs. 2,749,584; salary for 13 days worked in December 2011 at Kshs. 114,566; and 1 month salary in lieu of notice at Kshs. 229,132, total-Kshs. 3,093,282;***
- c. ***The Respondent shall within the same period of time ensure the Claimant receives his pension from Respondent's Staff Pension Scheme as computed on 27th December 2011;***
- d. ***The Respondent to issue to the Claimant his certificate for 9,555 kenolkobil shares within 30 days of the delivery of this Award;***
- e. ***The Respondent to avail to the Claimant a full statement of account, indicating dividends earnable on these shares from the date of their vesting, and to pay such dividends to the Claimant promptly;***
- f. ***No order on the costs and interest.***

Dated and delivered at Nairobi this 19th day of September 2014

James Rika

Judge